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In The

Supreme Court of the United States

October Term, 1981

STATE OF WASHINGTON, et al.,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE
League of Women Voters of Seattle,
League of Women Voters of Washington,
League of Women Voters of the United States

1411 Fourth Ave. Bldg.
Room 610
Seattle, WA 98101
(206) 624-8901

PALMER SMITH
LYNN D. WEIR
Smith, Brucker, Winn
& Ehlert

Counsel for League
Amici Curiae

QUESTIONS PRESENTED

1. If a school district voluntarily adopts a program to reduce racial imbalance in its schools, does state action reversing such a program violate the Fourteenth Amendment?

2. When a school district voluntarily adopts such a program based on federal law strongly inviting, encouraging, and financing such action, is state action that would reverse such a program preempted, pursuant to clause two of Article VI of the Constitution?

3. To encourage such voluntary action should this Court adopt guidelines (termed herein the "Seattle Rule") providing that, if a school district adopts such a program, following procedures and containing elements specified by this Court, such program may not be interfered with so as materially

to increase racial imbalance, absent a compelling state interest, until the underlying conditions giving rise to such segregation or racial imbalance in the district's schools have been removed or have passed away?

4. Should such guidelines be:

(A) A determination by the school district that segregation or racial imbalance exists in its schools;

(B) A determination by the district that redressing such racial imbalance will improve the quality of education;

(C) Notice to and an opportunity for the public to be heard;

(D) Broad community participation in and approval of the program;

(E) Consideration of alternative remedies and associated ameliorative actions;

(F) Preparation of a written plan;

(G) Public availability of the written plan;

(H) Opportunity for public comment on the plan before its adoption;

(I) Inclusion in the plan of effective, substantive measures to reduce racial imbalance and the effects of racial discrimination;[1]

(J) Use by the school district of reasonable means for measuring progress towards the plan's objectives;

(K) Adoption of the plan?

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[1]Measures purely voluntary on the part of children and their parents already condemned by this Court as ineffective or constitutionally inappropriate to reach constitutional objectives (e.g. the freedom of choice" plan invalidated in Green v. County School Board, 391 U.S. 430 (1967)) would be excluded or, if ineffective alone, would be usable only if coupled with effective measures.

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INTEREST OF AMICI CURIAE

All parties have agreed to the filing of this brief.

The League of Women Voters of Seattle is a non-profit, non-partisan corporation, affiliated with and sharing the aims and principles of the League of Women Voters of Washington and the League of Women Voters of the United States, each of which is also a non-profit, non-partisan corporation.

The League of Women Voters of Seattle favors ending racial imbalance in the Seattle schools. It opposed efforts to prevent school desegregation in Seattle and the related attempt to recall members of the Seattle School Board. It helped develop and endorsed the Seattle Plan and opposed Initiative 350. Its members live in and pay taxes in Seattle. Many have children in the Seattle schools.

The League of Women Voters of Washington favors voluntary but effective action

to correct racial imbalance in the schools. It opposed Initiative 350. Some of its members live in, pay taxes in, and have children in the schools of Pasco, Seattle, and Tacoma.

The League of Women Voters of the United States ("National League" herein) has about 114,000 members in over 1300 state and local Leagues in each state, the District of Columbia, Puerto Rico, and the Virgin Islands. Since 1920, the National League has promoted political responsibility through informed, active citizen participation in government. Among its guiding principles, it believes that no person or group should suffer legal, economic, or administrative discrimination.

In support of its position for equal access to education, the National League has long endorsed school desegregation, has supported federal efforts to assist school

desegregation plans, and has opposed restrictions on judicial and agency authority to fashion remedies.

At the state and local level, Leagues have promoted peaceful school desegregation in many ways, including: serving on advisory committees; working with local government, the media, and parents; promoting human relations activities; and when necessary, litigating. The League has promoted voluntary integration and has helped put into effect court-ordered plans to desegregate the schools.

All the League amici are concerned about the burdens now borne by the Federal judiciary, and want the "judicial power of the United States"[1] conserved, protected, and nurtured.

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[1] U.S. Const. art. III, § 1.

STATEMENT OF THE CASE

We adopt the Statement of the Case in the Brief of Appellees but emphasize and add to it the following:

I. The Historical Background

The historical background is that of American slavery and its complex aftermath. Population changes have generally spread this aftermath among us. But we bear in mind that slavery early existed in the North as well as the South and that many of the serious problems which stem from it are now northern, not southern, problems. Slavery preceded the Constitution[2] and compromised that document. Slavery compromised many of those from whom that document

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[2] On July 3, 1776, after debate, words critical of the King for his maintenance of the slave trade and for allegedly inciting slaves to rebel against their colonial owners were deleted from the draft Declaration of Independence. C. Bowers, The Young Jefferson 151 (Houghton Mifflin, 1945).

sprang. The aftermath of slavery lingers among, compromises, and burdens many of us today.

In his separate opinion in Regents of the University of California v. Bakke, 438 U.S. 265, 387-94 (1978), Mr. Justice Marshall stated the relevant history. The amici adopt his statement.

One part of the aftermath of slavery has been pervasive, manifold segregation and discrimination, continuing well after a Declaration that "All [men] are created equal." In public school education, remedies for slavery's aftermath, begun with "all deliberate speed . . . ," have been underway for less than 27 years. From 1619, when slaves were first sold by a Dutch ship at Jamestown, Virginia, 335 years passed until the decision in Brown v. Board of Education (Brown I), 347 U.S. 483 (1954).

Given the tenacity, pervasiveness and variety of the means used to sustain slavery and its aftermath, even after Brown I, effective measures to erase slavery's aftermath will need equal tenacity, variety, and time in which to work.

Education is one such measure.

This case concerns three voluntary educational solutions to northern, urban school segregation, and deals with one part of the aftermath of slavery.

II. Adoption of the School District Programs; the Seattle Plan

All of the appellee school districts voluntarily adopted programs to end segregation and to redress racial imbalance. Of the plans, the Seattle Plan is the most elaborate. Its adoption triggered Initiative 350. Since the proposed Seattle Rule is based on the Seattle Plan, we deal primarily with it.

A. The Seattle Plan

In developing its plan to desegregate its schools, or, as the Seattle School District puts it, to correct "racial imbalance," the district did the following:

1. Racial imbalance determined

For the 1977-78 school year the Seattle School District adopted a voluntary magnet school desegregation program (J.S. App. A-16). Certain of the intervenor plaintiffs in this case thereafter threatened the district with legal action.[3] Seattle's Mayor and business and civic

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[3] Intervenor plaintiff, the National Association for the Advancement of Colored People ("NAACP" herein), complained to the Office of Civil Rights of the United States Department of Health, Education and Welfare alleging intentional segregation of the district's schools. This complaint was settled on June 7-8, 1978 (FF 6-1, J.S. App. A-15). Other intervenor plaintiffs, joined by the NAACP, later threatened a desegregation lawsuit (FF 6.12, J.S. App. A-18; C.R. 409, page 6).

leaders encouraged the district to define racial isolation and to end it promptly (Pltf. Exh. 11). On June 8, 1977, the Seattle School Board adopted Resolution 1977-8 (Pltf. Exh. 9), defining "racial imbalance" as:

> the situation that exists when the combined minority student enrollment in a school exceeds the district-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body. . . .

This resolution acknowledged school racial imbalance and mandated its end by the 1979-80 school year (Pltf. Exh. 9; FF 6.9, J.S. App. A-17).[4]

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[4]The Brief of Appellants at 42 cites part of Mr. Justice Powell's opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), apparently for the proposition that the Seattle School District must first secure a judicial determination before it may take official cognizance of the risk that it may have, at some time in the past, acted unlawfully in

2. Quality of education

Resolution 1977-8 also found that:

> the best interests of the children of Seattle School District No. 1 will be served by providing all school children with the opportunity for quality multiracial education . . . .

3. Public notice and hearings

The school district gave the public notice and the extensive opportunity to be heard, as described below.

4. Broad community participation

Seattle broadly supported voluntary school district adoption of mandatory school desegregation measures. As noted, the Mayor and the presidents of the Chamber of Commerce, Municipal League and Urban

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(footnote 4 continued)

establishing de jure segregation. This seems a remarkable position for the State's chief law enforcement officer to maintain, given the importance to all law enforcement of voluntary adherence to the laws. Bakke, of course, dealt with state action excluding a white person from medical school, a case quite different from this one.

League urged the school board to adopt a process to end racial isolation in the Seattle public schools (Pltf. Exh. 6, 7, 11).

By Resolution 1977-9 (Pltf. Exh. 10) the board ordered extensive planning of desegregation measures (FF 6.9, J.S. App. A-17), including citizen input, and began to give massive publicity to such planning (Pltf. Exh. 6 at 2, 11).

Thirty public hearings were held throughout Seattle (Pltf. Exh. 7 at 14).

The district asked for plans and suggestions. The Seattle Urban League submitted a plan which the district in turn offered for public review (Pltf. Exh. 6 at 14; Pltf. Exh. 7 at 11).

5. Consideration of alternative remedies and related actions

School district planners drafted four different plans. Each plan included some

mandatory student assignment. These plans, the Urban League plan, and the merits of voluntary and mandatory measures to end racial imbalance were thoroughly discussed at the many public hearings. Educational enrichment and certain voluntary options were included in the plans (Pltf. Exh. 6 at 11; Pltf. Exh. 7 at 14-16).

6. Use of a written plan

The school district staff synthesized the five plans and the hearing results into a draft plan and presented it to the board in early December 1977 (Pltf. Exh. 6 at 11-12; J.S. App. A-17 to A-18).

7. Dissemination of the plan

The school district made the written plan available to the public (Pltf. Exh. 6 at 13).

8. Further public comment

Later in December 1977 the school board held more hearings on the draft plan and made further material changes (id.).

9. Inclusion of measures to reduce racial imbalance and racial discrimination

The plan promised to achieve, and has in fact achieved,[5] elimination or reduction (FF 6.13, J.S. App. A-18) of racial imbalance. Voluntary measures, theretofore tried alone and found ineffective (FF 6.5 -6.8; J.S. App. A-16 to A-17), were augmented and made effective by mandatory pupil assignment and busing. Voluntary enrichment from the earlier programs remained in the plan (FF 6.11; J.S. App. A-17 to A-18).

One-way burdening of particular racial groups, part of past voluntary practice (FF 6.6, 6.9, J.S. App. A-16), was avoided. Mandatory assignment was designed to affect

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[5] See Brief of Appellee School Districts.

many students, but to place burdens equitably (Pltf. Exh. 94). Children were not selected by race. Instead, the district chose neighborhood groups of children in fact or potentially known to each other who could share the educational value of discussing common experiences (Pltf. Exh. 7 at 16).

10. Means of measurement

The program relied on, and has administratively associated with it, reasonable means of measuring progress. The district, like most school districts, regularly tests, measures, and administratively reviews. The district uses an annual school census (Pltf. Exhs. 78-88) and achievement testing together with other appropriate measures for appraising desegregation and the other effects of its programs.[6]

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[6]This Court's ample "legislative fact" experience with school litigation enables

11. Adoption of the plan

On December 14, 1977, the school district, by Resolution 1977-28 (Pltf. Exh. 12), chose the particular programs and methods to end racial imbalance in its schools. This resolution repeated the definition of "racial imbalance" in earlier Resolution 1977-8. The Seattle Plan, which carried into effect the resolution, was adopted in March 1978 after still more hearings and changes (Pltf. Exh. 6 at 14; J.S. App. A-17).

III. Housing and School Segregation.

The District Court found that in each of the appellee districts there are residential areas in which minority races predominate (FF 3.3, J. S. App. A-7).

(footnote 6 continued)

it to take notice of the availability and use of such measures. See discussion, Fed. R. Evid. 201, Notes of Advisory Committee on Proposed Rules; C. McCormick, Handbook of the Law of Evidence §325 (1954).

In Pasco proper, non-whites found it hard to find housing and located largely in East Pasco. In nearby Richland "rigid Federal housing regulations . . . excluded blacks" (FF 4.1, J.S. App. A-9). East Pasco is "between 92 and 97 percent minority. . ." (FF 4.4, J.S. App. A-9). Residential segregation in Pasco resulted in racially imbalanced schools (FF 4.2, J.S. App. A-9).

In Tacoma housing patterns and other factors had concentrated racial minorities at certain of the district's schools (FF 5.2, J.S. App. A-10).

In Seattle, the Court found that

> [T]hese segregated housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented. . . . (FF 6.14, J.S. App. A-18)

and that parents consider the quality and location of neighborhood schools to be important when deciding where to live (FF 7.32, J.S. App. A-23).

IV. Seattle's Prior Voluntary Programs

In Seattle voluntary student assignment measures advocated by intervenor defendant Citizens for Voluntary Integration Committee (CiVIC), among others, had been tried. Various such measures had been used since 1963 (FF 6.2, J.S. App. A-16). During 1976-77 the school district had developed, publicized, and encouraged participation in a voluntary "magnet" school desegregation program (FF 6.5, J.S. App. A-16).

But the magnet program did not attract enough white students to achieve racial balance and most of the overall movement was by black students (FF 6.6, J.S. App. A-16 to A-17).

The District Court found that despite extensive voluntary, magnet, and mandatory middle-school, desegregation programs, racial imbalance increased between 1970

and 1978, and that the board had concluded that a voluntary plan without a mandatory "backup," could not effect acceptable racial balancing (FF 6.8, J.S. App. A-17).

SUMMARY OF ARGUMENT

Absent remedial measures, there is a mutually reinforcing relationship between housing segregation and school segregation.

Education must be provided free of suspect, state-imposed classifications based upon race, whether blatantly or subtly phrased.

The Court should strictly scrutinize Initiative 350 to determine if its classification serves a compelling governmental interest.

When State action would reverse prior action to remedy segregation, the distinction between de facto and de jure segregation is not legally relevant.

A trial of the issue of whether segregation is de facto or de jure is not a

necessary precondition for remedial action to undo school segregation.

The Congress and this Court have authoritatively invited and encouraged local, voluntary action to end segregation.

When a local school district takes such action to carry into effect constitutional rights, subsequent state action impairing such local action is preempted.

Such preemption is, however, confined within a relatively narrow range defined by the Constitution and Federal law.

Once adopted, such voluntary school district action or policies may, of course, be changed, subject to strict scrutiny.

To aid in limiting future occasions for such strict scrutiny or determinations of preemption, this Court should give guidance, in the form of the "Seattle Rule" urged herein. This Court should thereafter

protect local voluntary action taken consistently with such guidelines.

Such guidelines will clarify necessary procedures for voluntary action and will encourage such action.

Adoption of such guidelines will help to reduce steadily increasing judicial burdens and will conserve, protect, and nurture the judicial power of the United States.

ARGUMENT

The League *amici* support the briefs of the Appellees and the Seattle Intervenor Plaintiffs and the positions asserted therein. For the reasons of policy and law argued in this brief, this Court should also adopt the Seattle Rule urged here.

The key facts in this case are that: (a) the three school districts acted voluntarily; (b) each program addresses segregation or racial imbalance which arises

from housing segregation; and (c) the State action being subjected to scrutiny is not direct State action originally taken to segregate the schools, as in the case of a dual school system. Instead the action is secondary state action, reversing a voluntarily-adopted desegregation remedy. Such state action, if upheld, will, however, resegregate the schools.

We first deal with the relationship between housing segregation and school segregation.

There is an intimate, symbiotic, and mutually-reinforcing relationship between residential segregation and school segregation.

In Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 21 (1971), the Court said, in discussing the importance of choices and policies as to school location:

> Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

The Court sees as clearly as do we this mutually-reinforcing relationship.

In their briefs, both the State and the United States virtually ignore this relationship.

The omission is significant.

In the Jurisdictional Statement the State twice used the term "racially neutral" in connection with both the neighborhood school assignment policy and Initiative 350 (J.S. at pp. 10, 17).

The brief for the United States of America states at page 12:

> The initiative does not split the citizenry into racially identifiable subgroups, and therefore does not classify persons according to race . . . .

Initiative Measure No. 350, of course, like all law, takes breath, life and meaning only in application to facts.

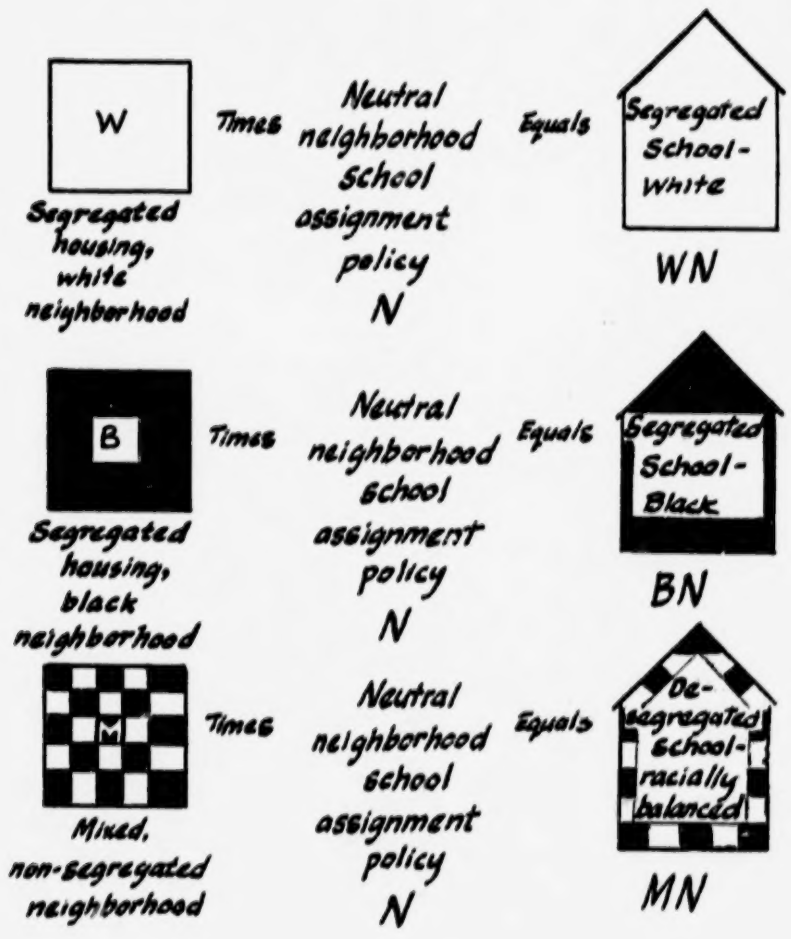
To ignore housing segregation when considering school segregation rests the argument in air and risks Mr. Bumble's comment in Oliver Twist that then "the law is a ass -- a idiot."

The initiative can be characterized as "racially neutral" only so long as the appellants ignore the District Court's findings as to housing segregation.

The Court understands this. But the appellants choose to use the term "racially neutral" in an effort to save the initiative.

The relationship between housing segregation and school segregation, absent intervention by voluntary school district or compelled judicial action, is so clear

that it can be graphically and mathematically represented as follows:



Expressed mathematically, if term W has the quality of being "segregated/white" then the product of W and n (Wn) necessarily has the quality of "segregated/white." Similarly, the product of the formula B x n (Bn) will have the quality of "segregated/black." In contrast, Mn, the product of M x n, will lack the quality of segregation, white or black.

Use of a neighborhood assignment policy in a district with segregated housing will result in segregated schools.

We next address the questions presented.

I. State Action That Reverses a Voluntarily Adopted Program to Reduce Or End Racial Imbalance In a School District Violates the Fourteenth Amendment

A. The Court should strictly scrutinize Initiative 350

The Court subjects to strict scrutiny state statutes or practices that explicitly

or implicitly disadvantage a "suspect class" or impinge upon a fundamental right protected by the Constitution. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973). Such state action is upheld only if it furthers a compelling governmental purpose, Loving v. Virginia, 388 U.S. 1, 11 (1967), and, even then, only if no less restrictive alternative is available, e.g., In re Griffiths, 413 U.S. 717 (1973).

Under these standards, equal protection of the laws is denied not only when laws and programs invidiously discriminate on their face against racial, ancestral, or similarly disadvantaged groups, e.g., Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), but when facially-neutral classifications mask invidious discrimination, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967), and when facially-neutral laws or

policies are discriminatory in administration, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886). Equal protection is likewise denied when a classification implicates or penalizes, with no compelling governmental interest, the exercise of a fundamental right explicitly or implicitly guaranteed by the Constitution. Police Department of Chicago v. Mosley, 408 U.S. 92, 96 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

In public elementary and secondary education, the Court first applied these standards to strike down state-mandated school segregation in Brown I, declaring:

> in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

(347 U.S. at 495.) In Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955), the defendant districts were ordered to desegregate their schools "with

all deliberate speed." Desegregation was long delayed. The Court then complained of "entirely too much deliberation and not enough speed," Griffin v. School Board of Prince Edward County, 377 U.S. 218, 229 (1964); and, later, in Green v. County School Board of New Kent County, 391 U.S. 430, 439 (1968), demanded a plan "that promises realistically to work and promises realistically to work now."

The principles of Brown I have been used not only to strike down state-wide systems of one-race schools in the South, Cooper v. Aaron, 358 U.S. 1 (1958); United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972); but have been broadened to include other non-complying action, North or South, e.g., Griffin, supra (closing public schools and private school grants to white children); Goss v. Board of Education, 373 U.S. 683 (1963)

("minority to majority" student transfer plans); Green v. County School Board, supra (district-wide "freedom of choice" plans not sufficiently changing school racial composition).

While the Court has fashioned remedies for purposeful discrimination, it has not yet permitted federal courts to cure de facto segregation. Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. 1. The de jure/de facto distinction has troubled some members of the Court. See Keyes (Powell, J., concurring). The distinction seems ambiguous after Brown I, where the Court stated at 494 that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children," the impact only

being greater when "it has the sanction of the law."[7]

Neither this Court, nor the Court of Appeals below, has yet held that a "neighborhood school policy" of itself justifies

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[7] As amici we are seriously troubled by the case-by-case, legal quagmire that has developed since Brown I.

In Bolling v. Sharpe, 347 U.S. 497, 500 (1954), the Court said,

> Segregation in public education is not reasonably related to any proper governmental objective . . . . In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

The duty thus defined is that of the Federal Government. All Federal instrumentalities, including this Court, are inhibited from "maintaining racially segregated public schools."

If children similarly affected by segregation (whatever the cause) apply to this Court to end such segregation, de jure or de facto, and if this Court denies relief on the basis that the segregation is merely de facto, is this Court itself "maintaining segregated schools?" And we believe that

court intervention in the absence of purposeful discrimination. Keyes v. School

(footnote 7 continued)

the proliferation and maintenance of complicated evidentiary doctrines, presumptions, and distinctions by this Court now more heavily burden plaintiffs who seek relief from de facto segregation than those who seek relief from de jure segregation. As a result, the first group of plaintiffs may not now enjoy the equal protection of the law.

These are troubling questions.

Even more seriously, the piling up of the ponderous procedural and evidentiary de jure versus de facto complexities obscures a simple truth.

American children need to be taught to think straight about race.

The best way to teach a child to think straight about race is to present him or her with the best evidence. The best evidence is available in the presence of other children like herself or himself in many ways, but superficially different, e.g., of a different race, creed, or color. In such circumstances, guided by wise teachers, the child may learn by experiencing this best evidence.

This is the powerful common sense of Brown I.

But now, white and black children, often living in segregated housing, do not have this best evidence readily available.

District No. 1, Denver, Colo., supra, (question expressly reserved); Seattle School District No. 1 v. State of Washington, 633 F.2d 1338 (9th Cir. 1980); Diaz v. San Jose Unified School District, 612 F. 2d 411 (9th Cir. 1979). The Court has not yet said that de jure segregation will result if a local school district applies a neighborhood school policy to segregated housing.[8] In this area of law a majority

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(footnote 7 concluded)

It might be argued, as an abstract proposition, that the Nation which declared that "All . . . are created equal" has a special responsibility for such teaching. But the matter is, regrettably, not an abstract proposition. The darker side of our national history -- e.g., slavery and its aftermath; many of the national policies toward Indians; Manifest Destiny and the war against Mexico; the use of ethnic quotas in the immigration laws; and the wartime relocation of Japanese-Americans -- requires such teaching.

[8]Nonetheless, in school desegregation cases the Court has closely examined the effect of action, non-action, and desegregation remedies by local officials. See

has not yet applied the legal principle that a person is presumed to intend the natural and foreseeable consequences of his or her voluntary acts.[9]

(footnote 8 concluded)

Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973) (racially inspired school board actions have impact beyond particular schools subject to such action); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979) (finding of de jure segregation in 1954 imposes affirmative duty to disestablish dual school system and its effects); Dayton Bd. of Educ. v. Brinkman (Dayton II), 443 U.S. 526 (1979) (measure of post-Brown conduct under unsatisfied duty to desegregate is the effectiveness, not purpose, of actions decreasing or increasing segregation).

[9]Compare Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (disparate impact may be most important evidence of purposeful discrimination "[f]or normally the actor is presumed to have intended the natural consequences of his deeds") and Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences") with Columbus Bd. of Educ. v. Penick, supra, at 464 ("actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose").

Instead, the Court has said that local school districts may not be compelled to desegregate absent purposeful discrimination. Milliken v. Bradley, 418 U.S. 717 (1974). The Court has also remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), the decision in United States v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976), where a local neighborhood school policy had been invalidated based on consequences foreseeable from its application to segregated housing. Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.).

We turn next to this case.

B. In this case the de facto/de jure distinction is irrelevant

The state action under review in this case is Initiative 350. An initiative is state action and as such must be exercised subject to constitutional restraints. Reitman v. Mulkey, 387 U.S. 369 (1967).

The target of state action here is, however, remedial action by other public entities of the State of Washington. Initiative 350, if applied, will undo "operative regulations" that these school districts have determined are needed to provide a more equal and better educational opportunity. See Dayton Board of Education v. Brinkman (Dayton I), 433 U.S. 405, 413 (1977). Their goal was termed a "constitutionally permissible" objective in Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978). See also Swann v.Charlotte-Mecklenburg Board of Education, supra, 402 U.S. 1.

Initiative 350 is not direct State action taken to segregate the schools, but action taken to undo remedial action and would resegregate the schools.

The de facto/de jure segregation distinction has been used to distinguish

between segregation caused by official action and that which arises from private, non-state action. The Fourteenth Amendment inhibits discriminatory "state action," including action fostering private discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

But when the Court scrutinizes state action that would reverse other clearly remedial state action, the de facto/de jure distinction is of little use. A distinction needed to guide courts in determining what is constitutionally forbidden in cases in which remedial action has not yet been taken, is not needed to analyze the quite different legal situation that arises where operative action in pursuit of constitutional objectives will be thwarted by reversing action. See Dayton I, supra.

If original state action to segregate the schools directly would have been suspect action, requiring strict scrutiny, then state action to reverse remedial action is itself sufficiently suspect as to need strict strutiny.[10]

The Court should lend its authority to maintain voluntarily adopted local gains against the aftermath of slavery, so that constitutional liberty will be increased and a perception of steadily increasing justice will be felt. We believe a society, perceiving increasing justice, will tend to be more peaceful and law-abiding.

C. Use of strict scrutiny in this kind of case will further sound public policy

The Court should protect and encourage voluntary school district action to

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[10] Initial remedial action itself must, of course, withstand constitutional scrutiny. Regents of the University of California v. Bakke, supra, 438 U.S. 265.

desegregate and correct racial imbalance for the following additional reasons.

First, school district action to voluntarily adopt a plan like the Seattle Plan, after the care and deliberation used by the school district, should carry great weight with a reviewing court. The process reflects and is in accord with due process of law.

Second, the board of directors of the Seattle School District adopted the Seattle Plan pursuant to an oath of office (J.S. App. A-18)

> to support the Constitution of the United States and the State of Washington and to faithfully discharge the duties of his [or her] office according to the best of his [or her] ability. (R.C.W. 28A.57.322.)

Third, except for judges themselves public school officials, more than most other officials, have fiduciary characteristics in relation to children.

The term "fiduciary" is very broad. It embraces "both technical fiduciary relations, and those informal relations which exist whenever one man trusts in and relies upon another. . . ." Black's Law Dictionary 753 (Rev. 4th ed. 1968) ("fiduciary relation"). This aspect of school board duties is evidenced by the care that American electorates generally use in elevating persons to school board office. Voluntary, deliberate action by persons such as these, subject to needed judicial guidance, is action that judges can trust.

Fourth, present-day political realities suggest that it is unlikely that use of busing as a remedy will be abused. Such action will usually be taken if it is the only available alternative.

If the review standard urged here is adopted, nothing will later forbid change in a plan thus adopted, provided that the

change will withstand strict scrutiny to determine whether it offends the constitution. Even the most far-seeing plans, once adopted, may need revision to meet new needs. The fact that such change must itself meet constitutional requirements reinforces the desirability of adopting guidelines for voluntary action.

Fifth, adoption of a standard of strict scrutiny for such changes will not itself increase judicial business. If a standard of strict scrutiny as to later changes is adopted (a) the initial design and adoption of a plan will be done very carefully -- as was the Seattle Plan; (b) later measures of change will be carefully reviewed for their probable effect on constitutional rights; and (c) the annual school census will readily determine effects on racial imbalance. Moreover, where a violation of constitutional rights is now claimed, a person may already resort

to the Courts. On the other hand, if the appellants have their way, a burdensome, time-consuming, and expensive trial on the issue of de jure segregation will be needed, with its racially-polarizing effect of raking up past history in community after community.

Finally, the appellants argue for a procedure that will in fact make it more difficult to desegregate and then only to the barest extent required by the Constitution.

In other words, before voluntary action rooted in decency, courage, common sense, and neighborly openness may be indulged, there must be a judicial determination which, since Brown I, has become somewhat like a finding of criminal guilt.[11]

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[11] See Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 199, n.10 (1973).

This is not healthy and decent politics.

Is it not paradoxical that, in the appellants' view, only an intentionally segregated school system can be desegregated (by court order), while a school system wishing for educational purposes to correct racial imbalance can be lawfully forbidden to desegregate?

Slavery was maintained by pervasive fear. Its aftermath is associated with fear. It takes courage to make these changes.

Concerned parents will doubtless continue to fear the new and will pressure school boards. Doubtless, members of this Court early in 1954 had reservations about what would lie before the country after the handing down of their opinion in Brown I.

As Golding teaches us from his allegory based on childhood in The Lord of the

Flies, courage is not the absence of fear, but rather its rational, ordered control.

Who among us can honestly say that he or she is wholly free from such fears? This Court is, of course, familiar with this. Slowly, patiently, firmly, but inexorably, this Court has been contending with and exorcising such fears. The moral dimension in helping others to moderate and control their fear has been part of this Court's work. In this regard the debt of all of us to the Court is incalculable.

D. The relationship between education and the rule of Law reinforces the need to strictly scrutinize measures which would reverse remedial action

This Court has increasingly acknowledged the importance of education and also the importance, in modern America, of diversity in student bodies. Sweatt v. Painter, 339 U.S. 629 (1950); Brown I, supra; San Antonio Independent School

District v. Rodriguez, supra, 411 U.S. 1; Regents of the University of California v. Bakke, supra, 438 U.S. 265.

Fundamental provision for education was made even before the Constitution was ratified.[12]

Horace Mann argued persuasively that education, in the hands of capable

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[12] In 1785, under the Articles of Confederation, the Congress ordained a rule of educational equality in establishing the foundations of the public land system, by providing "There shall be reserved the lot No. 16, of every township, for the maintenance of public schools within the said township . . . ." Land Ordinance of 1785, reprinted in H. Commager, ed., Documents of American History 123-24 (9th ed. 1973). The Northwest Ordinance of 1787, drafted by Thomas Jefferson, provided in part:

> Art. 3. Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. . . . " (H. Commager, supra, at 131.)

That Ordinance also prohibited slavery in the Northwest Territory. Id., art. 6.

teachers, tends to make persons more capable of governing themselves, less in need of being governed, and less likely to become ungovernable, and that education, to be publicly provided in reasonable amounts, tends to make for a more productive, happy, less angry and therefore more law-abiding citizenry.[13]

Public education since Brown I has changed, and is increasingly changing, the condition of many Americans. Many among us now do things which they could not do before Brown I. Since Brown I, education has helped to increase understanding and to reduce the tensions and anger that periodically threaten the rule of Law among us.

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[13] Twelfth Annual Report of Horace Mann as Secretary of the Massachusetts State Board of Education (1848), reprinted in H. Commager, supra, at 317-319.

Education directly supports both the values which the Constitution protects and the work of this Court. Educated persons, given clear and just laws, fairly adopted and properly applied, are more likely voluntarily to obey the law. If the laws are clear and persons are educated to understand the laws, citizen action and understanding is made easier and more powerful. Education thus specifically fosters the rule of Law, eases the burdens upon the judiciary, and conserves, protects, and nurtures the "judicial power of the United States."

The relationship between education and the rule of Law reinforces the need to use strict scrutiny in aid of educational measures to remedy the aftermath of slavery.

II. When a School District Voluntarily Adopts a Program to Desegregate Or Correct Racial Imbalance That Is Based On Federal Law Which Invites, Encourages, and Finances Such Voluntary Local Action, State Action Reversing Such a Program is Preempted

A. Congress may act

Section 5 of the Fourteenth Amendment provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

In acting, Congress need not remedy an evil completely or all at once. "[R]eform may take one step at a time." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). With respect to school desegregation, Congress favors voluntary local action. By so doing Congress has preempted state interference with local school board action desegregating district schools when such action furthers constitutional objectives.

B. Congress favors voluntary action

The Emergency School Aid Act of 1978, Title 20 of the U.S. Code, states:

§ 3192 Findings and purpose

(a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.

(b) The purpose of this subchapter is to provide financial assistance --

. . . .

(2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students. [Emphasis supplied.]

§ 3193 Policy with respect to the application of certain provisions of Federal law

(a) It is the policy of the United States that guidelines and criteria established pursuant to this subchapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

> (b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 2000d-5 of Title 42 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. [Emphasis supplied.]

(Emphasis supplied.)

The foregoing states the national policy favoring voluntary action to end segregation, whatever the cause.

C. Federal law subordinates Initiative 350's "neighborhood school policy" to the national policy favoring local voluntary action

The State quotes section 202 of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701, stating that it is the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." Brief of Appellants at 35.

The State does not quote fully. Section 217 of the Act, 20 U.S.C. §1716, also provides:

> Voluntary adoption of remedies.
>
> Nothing in this subchapter prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this subchapter nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this subchapter, if such plan is voluntarily proposed by the appropriate educational agency. [Emphasis supplied.]

The neighborhood school policy has thus been expressly subordinated to the voluntary plans of Pasco, Seattle, and Tacoma.

Presidential messages have also favored voluntary action.

The President's Message to the Congress proposing the Emergency School Aid Act of 1970 stated:

To the Congress of the United States:

> Successfully desegregating the nation's schools requires more than the enforcement of laws. It also requires an investment of money. (48 Pub. Papers 448.2.) [Emphasis supplied.]

He proposed three aid categories, one being

> Aid to districts that wish to undertake voluntary efforts to eliminate reduce or prevent de facto racial isolation, with such aid specifically targeted for those purposes. (Id.)

The President further noted that:

> In most of our large cities, and in many smaller communities, housing patterns have produced racial separation in the schools which in turn has had an adverse effect on education of the children. It is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist local school districts attempting to overcome its effects. (Id.) [Emphasis supplied.]

In 1978 the President recommended amendments, later adopted, to the Elementary and Secondary Education Act to

"encourage voluntary local initiatives to overcome the adverse effects of minority group isolation. . . ." H.R. Doc. No. 95-296, 95th Cong., 2d Sess. 4 (1978) [Emphasis supplied].

Initiative 350 is a state policy that "may produce a result inconsistent with the objective of the federal statute." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Since mandatory student assignment is essential when housing is segregated, Initiative 350 is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

This preemption of state action is, however, narrow. It does not free local school districts to do whatever they would like, without legitimate and appropriate State supervision. As to all areas of

State supervisory action which do not offend preemptive federal law and the Constitution, the State may continue to act.

Preemption having occurred, there is, of course, a risk that later federal action may seek to undo what has been done. But federal action to impair the substance of constitutional rights, once defined, must itself be subject to strict scrutiny, otherwise constitutional protections will be meaningless. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

III. This Court Should Also Encourage Voluntary Action By Adopting Guidelines (Termed Herein the "Seattle Rule") Providing That, If a School District Voluntarily Adopts a Program, Following Procedures and Containing Elements Specified by This Court, Such Program May Not Be Interfered With So As Materially To Increase Racial Imbalance, Absent a Compelling State Interest, Until the Underlying Conditions Giving Rise to Such Segregation or Racial Imbalance In the District's Schools Have Been Removed or Have Passed Away

In Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 6, in reviewing a specific District Court plan, this Court adopted guidelines based on federal judicial experience in grappling "with the flinty, intractable realities" of putting Brown I and Brown II into effect.

In this case the Court also reviews specific plans which are, however, different from the plan reviewed in Swann in two respects. First, they were voluntarily adopted. Second, they have been effective in reducing racial imbalance.

The Seattle School District, as its litigation and election record amply indicates, has experienced its own "flinty, intractable realities."

As in Swann, the Court should issue guidelines in exercise of its equity power in this case for two main reasons.

First, difficulty in applying the Court's decisions has created a quandary for local officials obliged to take educationally responsible and lawful action.

Second, the lack of guidelines for voluntary action needlessly burdens the judiciary.

A. The Court has created a quandary for local school officials

In Brown I the Court stressed the importance of education. Since then matters have moved forward.

In Regents of the University of California v. Bakke, supra, 438 U.S. at 311-12 (1978), Mr. Justice Powell noted that one of the goals

> asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal . . .

If this goal is important at the graduate and undergraduate academic level, where attendance is not mandatory, it is even more important in the primary and secondary schools. The minds of such pupils are not fully formed. Such children may then be closer than they will later be to unwitting sources of prejudice. By law such children must be at school.

Segregation of children from each other by race is itself wrong, whatever the cause -- segregation by law, as said in Brown I, merely adding to the offense. How deeply, therefore, does it offend the sense of duty of school board members, and the sense of duty and the sense of professional responsibility of teachers, to compel them to place, maintain, and teach students in schools that are segregated -- for whatever reason?

In Brown II, 349 U.S. at 298, the Court incorporated findings of Brown I that "racial discrimination in public education is unconstitutional" and said:

> All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. [Emphasis supplied.]

The Court continued, at 299:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems . . . . [Emphasis supplied.]

Given such language, many local school board members have felt that they must attack a condition of segregation not yet judicially-determined as to cause, but bearing similarities to conditions elsewhere held to have been purposeful.

But in school systems with no judicially-determined record of de jure segregation there is difficulty in interpreting and applying this Court's pronouncements.

The Court has not spoken clearly.

We urge the Court to adopt a clear rule of decision for cases involving urban housing segregation and voluntary action that will define the role of, protect, and encourage voluntary local school district action and will promote equal justice under law.

B. Judicial burdens

The judiciary needs relief.

Federal judicial business is relentlessly increasing.[14] State court business shows similar increases.

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[14] Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1981 (1981); id., Workload Statistics for the Decade of the 1970's (1980); id., Federal Judicial Workload Statistics for the Twelve Month Period Ended March 31, 1980 (1980); id., 1979 Annual Report of the Director (1979).

Since 1960 civil rights cases have steadily increased within the judicial workload. Among civil rights cases the school desegregation cases are particularly complex, and time-consuming.[15]

Analysis also indicates that there is no single grand stroke which can help. Burdens added incrementally must be reduced incrementally. Marginal effects on parts of the total case-load are important. As to the school desegregation part of this work-load we urge:

First, strict scrutiny of statutes and administrative procedures interfering with remedial action will reduce the need for

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[15] In Swann v. Charlotte-Mecklenburg Board of Education, supra, 402 U.S. at 14, the Chief Justice, in noting the need for "guidelines," commented in footnote 5:

> The necessity for this is suggested by the situation in the Fifth Circuit where 166 appeals in school desegregation cases were heard between December 2, 1969, and September 24, 1970.

long, complex trials on the de jure - de facto issue.

Second, if federal preemption protects local voluntary action, fewer court proceedings will be needed.

Third, clear guidelines shielding voluntary action will give rise to fewer cases.

With clear guidelines local school district counsel everywhere can advise school board members. School board members seeking election can cite a reinforced national policy favoring local voluntary action. Citizen action will be made more effective.

IV. The Proposed Seattle Rule

The guidelines suggested are set out in the fourth Question Presented and are discussed in our Statement of the Case.

As we have noted, most of what was done in Seattle is familiar, careful due

process of law. Seattle's experience indicates that school board members can stand for election on such a program and win. The Seattle Rule is good, decent politics.[16]

We do, however, want to say a word about "busing."

The duration of remedial measures should be measured by the duration of the underlying conditions to which such measures are addressed. When the underlying conditions have changed, the remedial measures can be abandoned.

But busing, as a remedy, will not be needlessly prolonged. Districts have strong financial incentives not to over-use this remedy.

A Seattle Rule will help the Court cut its way out of the current tangle of the

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[16] The power of the courts to order remedies for de jure segregation would, of course, not be impeded by the adoption of guidelines for voluntary action.

law and will clearly summon school districts and citizens to act voluntarily but effectively.

In protecting these appellee school districts this Court will encourage all school districts.

In closing, we suggest that the grand fallacy of the appellants' approach is to try, by ignoring the relationship between housing segregation and school segregation, to pit against each other two fundamental principles of justice which must be harmonized. The first such principle is that those who stand in equal circumstances before the law must be treated equally. The second principle is that justice must be "distributive" and must, in order to reach "equality," compensate for preexisting inequality and wrong.[17] These

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[17] Aristotle, The Nichomachean Ethics, Book V (The Oswald Translation - Bobbs-Merrill, 1962).

principles antedate written law. They are probably inherent in, and imprinted on, the structure of the human mind.[18]

In this case the distributive principle requires that, where housing is segregated, compensatory remedial action should be taken so that children who grow up in such segregated housing will have a chance to learn to think straight about race.

CONCLUSION

At Gettysburg, at Little Round Top, the Wheatfield, the Peach Orchard, and other quarters of that bloody field, sincere opponents contested the ground in terrible violence.

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[18] That these principles probably antedate all written law and are inherent in the structure of the mind can be ascertained by observing how frequently children, even very small children, regularly invoke them in dealing with their parental "law-givers."

In contrast, in Pasco, Seattle, and Tacoma, the fighting has been mostly by lawsuits and in elections. Because of the rule of Law,[19] the fighting has been bloodless. In Seattle, at least nine law suits, a recall campaign, the Initiative 350 campaign, and several school board elections have marked the contest.

It is now time for the end. Segregated schools in these districts, whatever the cause, should be ended -- forever.

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[19]The Fourteenth Amendment, part of the rule of Law in this country, is a child of war. At the Wheatfield the 1st Minnesota sustained 82% casualties and there, after six attacks and counter-attacks, the South left 500 of its dead. At the Peach Orchard, having four times asked permission of General Longstreet to take Little Round Top above the Union Left, Major General John B. Hood was wounded and borne from the field.

A long run promise of education is the curbing of some of the roots of violence and the sustaining of the rule of Law. In fostering education the Court fosters its own work.

As we said at the outset, we deal with the aftermath of slavery as it affects children.

> "'Woe unto the world because of offenses; for it must needs be that offenses come.'"

Lincoln enjoined us to have malice toward none, charity for all, and to bind up wounds.

Those in local school districts whose daily duty it is to bind up the wounds still being inflicted on children by the aftermath of slavery, should be given the protection urged in this brief.

Clear guidance should be given to local school officials so that they may do what they believe to be both educationally sound and lawful.

Strong citizen action should be encouraged.

We urge the Court not only to affirm the judgment of the Ninth Circuit, but to adopt guidelines (the Seattle Rule) for future cases involving school district voluntary action.

Dated: January 25, 1982

Respectfully submitted,

SMITH, BRUCKER, WINN & EHLERT

By: PALMER SMITH
LYNN D. WEIR
Counsel for the League amici